STAR LAKE RAILROAD CO.

v.

AREA DIRECTOR, NAVAJO AREA OFFICE, BUREAU OF INDIAN AFFAIRS

AND NAVAJO TRIBE OF INDIANS

IBIA 86-42-A Decided July 10, 1987

Appeal from a decision of the Area Director, Navajo Area Off ice, Bureau of Indian Affairs, terminating a right-of-way over Navajo tribal trust lands.

Affirmed.

1. Administrative Procedure: Administrative Review--Appeals: Jurisdiction--Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Generally

   Upon the expiration of the 30-day time period established by 25 CFR 2.19(b), any party to an appeal pending before the Bureau of Indian Affairs official exercising the review authority of the Commissioner of Indian Affairs may invoke the jurisdiction of the Board of Indian Appeals.

2. Indians: Lands: Rights-of-Way--Indians: Lands: Tribal Lands--Statutory Construction: Indians

   Federal statutes concerning rights-of-way over tribal lands, and concerning tribal lands generally, evidence congressional intent to vest Indian tribes with power to control the use of their own lands.

3. Indians: Lands: Rights-of-Way--Indians: Lands: Tribal Lands--Regulations: Interpretation--Statutory Construction: Indians

25 CFR 169.20, providing for the termination of rights-of-way over Indian lands, is subject to the rule of construction that enactments intended to benefit Indians are to be liberally construed in their favor.

4. Indians: Lands: Rights-of-Way-Indians: Lands: Tribal Lands--Regulations: Interpretation--Statutory Construction: Indians

Where 25 CFR 169.20 provides for the termination of a right-of-way for nonuse for a consecutive 2-year period for the purpose for which the right-of-way was granted, no provision of statute, regulation, or the right-of-way documents authorized the Bureau of Indian Affairs to excuse involuntary nonuse without the consent of the tribe.

APPEARANCES: Jerome C. Muys, Esq., and John F. Shepherd, Esq., Washington, D.C., and Jeffrey T. Williams, Esq., Chicago, Illinois, for appellant; Arthur Arguedas, Esq., Office of the Solicitor, U.S. Department of the Interior, Window Rock, Arizona, for appellant; Paul E. Frye, Esq., Albuquerque, New Mexico, for the Navajo Tribe.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE VOGT

Appellant Star Lake Railroad Company challenges a February 12, 1986, decision of the Area Director, Navajo Area Office, Bureau of Indian Affairs (appellee; BIA) to terminate appellant's 2.726-mile right-of-way over Navajo tribal trust lands in McKinley and San Juan Counties, New Mexico. For the reasons discussed below, the Board affirms that decision.

Background

In 1974, appellant, a wholly owned subsidiary of the Atchison, Topeka and Santa Fe Railway Company (Santa Fe), announced plans to construct a railroad line into the San Juan Basin in northwestern New Mexico to provide transportation for coal to be mined in the Star Lake-Bisti area. The proposed line was to run from a connection on the existing line of the Santa Fe Railway near Baca (Prewitt), New Mexico, northeasterly through Hospah to Pueblo Pintado, a distance of about 62 miles, at which point the line was to branch off eastward some 10 miles to Star Lake with an additional 44 miles northwestward through Gallo Wash. The total length of the proposed line was approximately 114 miles. It was to cross Federal, State, tribal trust, trust allotted, and private lands.

In December 1979, pursuant to approval given by the Secretary of the Interior in August 1979, the Bureau of Land Management (BLM) granted a right-of-way to appellant over 12 miles of public lands. The Secretary's approval stipulated that construction would not begin until BIA approved a right-of-way across Indian lands.

On January 15, 1981, the Assistant Secretary--Indian Affairs authorized and directed appellee to approve, on or before January 16, 1981, a right-of-way for appellant over Navajo tribal trust lands. The Assistant Secretary specified that the right-of-way was to incorporate an agreement dated January 12, 1981, between the Navajo Tribe (tribe), appellant, and Santa Fe.

On January 16, 1981, appellee granted an easement for a 2.726-mile right-of-way, containing approximately 58.384 acres, to appellant. The right-of-way grant incorporated the January 12 agreement. It also contained the following proviso:

> PROVIDED, that this right-of-way shall be terminable in whole or in part by the Grantor for any of the following causes upon 30 days' written notice and failure of the Grantee within said notice period to correct the basis for termination (25 CFR 161.20): [1/]
>
> A. Failure to comply with any term or condition of the grant or the applicable regulations, including but not limited to requirement for archaeological clearance prior to construction.
>
> B. A nonuse of the right-of-way for a consecutive two-year period for the purpose for which it was granted.
>
> C. An abandonment of the right-of-way.
>
> D. Failure of the Grantee, upon the completion of construction, to file with the Grantor an affidavit of completion pursuant to 25 CFR 161.16.

Consideration for the right-of-way was $11,672.80. 2/

1/ 25 CFR Part 161 was redesignated Part 169 at 47 FR 13327 (Mar. 30, 1982). Section 169.20 provides:

"All rights-of-way granted under the regulations in this part may be terminated in whole or in part upon 30 days written notice from the Secretary mailed to the grantee at its latest address furnished in accordance with § 169.5(j) for any of the following causes:

"(a) Failure to comply with any term or condition of the grant or the applicable regulations;

"(b) A nonuse of the right-of-way for a consecutive 2-year period for the purpose for which it was granted;

"(c) An abandonment of the right-of-way.

"If within the 30-day notice period the grantee fails to correct the basis for termination, the Secretary shall issue an appropriate instrument terminating the right-of-way. Such instrument shall be transmitted by the Secretary to the office of record mentioned in § 169.15 for recording and filing."

2/ The Jan. 12 agreement also provided that appellant would furnish certain benefits to the tribe and its members. These benefits included construction

Sometime prior to October 24, 1984, the tribe notified appellee that it wanted the right-of-way terminated. 3/ On October 24, 1984, appellee wrote to appellant stating that the tribe had requested termination, and that certain bases for termination of the right-of-way existed:

> 1. Failure to use the right-of-way for a consecutive two-year period for the purpose for which it was intended.
>
> Field inspection of the tracts of land cited in the easement reveal that construction of the railroad has not commenced, and therefore, that the Star Lake Railroad Company could not have used the right-of-way for the purpose for which it was intended; i.e., operation of a line of rail. Our records further show that supplemental archaeological clearance reports have not been filed.
>
> 2. Failure to comply with various terms, conditions and stipulations contained in the January 12, 1981 agreement between the Navajo Nation, Star Lake Railroad, and Atchison, Topeka and Santa Fe Railroad, in that:
>
> [a] The Star Lake Railroad Company failed to submit to the Navajo Land Administration Department, Window Rock, Arizona, a proposed handbook concerning damage claims, policies and procedures by February 11, 1981 as required by Paragraph 4 of Agreement.
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> [b] Star Lake Railroad Company failed to submit [to] the Navajo Nation a proposed handbook concerning employee conduct as required by Paragraphs 8 and 10 of the Agreement.

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fn. 2 (continued)
of sidetracks and other facilities for use by Navajos, employment preference and training for Navajos, and contribution to a college scholarship program for Navajo students (Agreement at sections 12, 13, 14, and 15).

3/ The record contains an undated memorandum addressed to appellee and entitled, "Notification of Termination of Right-of-Way to Star Lake Railroad and Request for Action by Navajo Area Director." It is signed by the tribe's Attorney General. Appellee's October 24 letter and the Attorney General's memorandum both refer to a Nov. 8, 1983, resolution of the Advisory Committee of the Navajo Tribal Council requesting appellee to notify appellant that the right-of-way was terminated.

Appellee's letter concluded:

> You have thirty [30] days to correct the deficiencies cited in this letter to demonstrate to our satisfaction that the above factual allegations are not correct. If you fail to do so within the 30-day period, the January 16, 1981 Grant of Easement for Right-of-Way shall be terminated in whole.

Appellant responded by letter of November 20, 1984, stating in relevant part:

> Star Lake has intended and still intends to construct a line of railroad across the right-of-way easement, as evidenced by its application to the Interstate Commerce Commission and continued prosecution thereof against the opposition thereto generated through the DNA-People's Legal Services, Inc. However, despite these efforts of Star Lake, the Interstate Commerce Commission has yet to issue its final decision approving such construction, thus rendering the inability of Star Lake to exercise further use of its easement through actual construction of the rail line involuntary on its part.

Appellant also stated that it had furnished the handbooks required by the agreement to the tribal attorney and a tribal employee.

On December 21, 1984, appellee terminated appellant's right-of-way on the grounds that appellant had failed to show it had in any way used the right-of-way for the purpose for which it was intended. Appellee noted that BIA's records contained no status reports from appellant or requests for extension of the 2-year period in which to begin construction. 4/

4/ Appellee's letter also stated that both the attorney and the employee to whom appellant stated it had furnished the required handbooks had left tribal employment, and that although the tribe was unable to locate the handbooks in its files, appellee would assume they had been delivered as stated by appellant.

Appellant appealed the termination to the Acting Deputy Assistant Secretary--Indian Affairs who, on August 29, 1985, remanded the matter to appellee for further consideration. The Acting Deputy Assistant Secretary concluded that appellee had not adequately explained his decision and that he should have analyzed the issue with respect to the best interest of the tribe. The decision concluded:

> Because the decision to terminate is a discretionary one and one which rests with the Area Director, and because it is apparent from a review of his December 21, 1984, decision that his reasoning was not adequately explained, I am hereby remanding the matter for his consideration. In the process of considering whether the termination is in the best interests of the tribe, questions to be addressed include, but are not limited to, the following: 1) have any of the factual conditions surrounding the grant of easement changed since the December 21, 1984, decision, 2) was the Navajo Tribe being hurt by continuation of the grant, and 3) will any benefits accrue to the tribe from any extension that Star Lake might seek?

(Aug. 29, 1985, Decision at 3).

In his February 12, 1986, decision on remand, appellee discussed the points required by the Acting Deputy Assistant Secretary and concluded:

> I hereby affirm the December 21, 1984 decision to terminate the January 16, 1981, Grant of Easement for Right-of-way on the following grounds:
>
> 1) Grantee Star Lake failed to demonstrate that it had in any way used the right-of-way for the purpose for which it was intended or to otherwise cure the default including a timely filing of a request for an extension of time. The term of the grant of easement makes it mandatory that the easement be terminated; therefore, no extension of time can be granted.
>
> 2) There is substantial evidence that the reinstatement or extension of the grant of easement would not be in the best interest of the Navajo Tribe.

> 3) To extend the grant of easement at this time would only be based upon the "intentions" of the grantee to use the right-of-way sometime in the future and such "use" is purely based upon "speculations" for the future development and marketing of coal leases held by Star Lake sometime in the future.

(Feb. 12, 1986, Decision at 8). By letter dated March 14, 1986, appellant appealed this decision to the Assistant Secretary--Indian Affairs. The tribe filed answer briefs.

[1] On June 6, 1986, the Board received a motion from the tribe stating that the appeal has been ripe for decision for more than 30 days and that no decision had been rendered. The tribe requested the Board to assume jurisdiction over the appeal pursuant to 25 CFR 2.19. 5/ By order of June 11, 1986, the Board made a preliminary determination that it had jurisdiction over the appeal. Appellant objected to the Board's determination, contending that parties to an appeal other than the appellant did not have the right to request the Board to assume jurisdiction pursuant to 25 CFR 2.19. The Board, and ultimately the Director, Office of Hearings and Appeals, in an order dated August 21, 1986, concluded that, contrary to appellant's contention, 25 CFR 2.19 is more than a choice of forum provision for appellants, but is, rather, a jurisdictional provision which may

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5/ 25 CFR 2.19 provides in relevant part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or BIA official exercising the administrative review functions of the Commissioner] shall:

"(1) Render a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Affairs for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

be invoked by any party to an appeal. Therefore, appellant's motions seeking to divest the Board of jurisdiction were denied.

The appeal was docketed by the Board on August 28, 1986. Appellant, appellee, and the tribe filed briefs.

Related Proceedings

In addition to the right-of-way over tribal trust lands, which is the subject of this appeal, appellant has sought a right-of-way over allotted lands held in trust by the United States for individual Navajo Indians. The proceedings concerning this matter, which have been long and involved, are discussed extensively by both appellant and the tribe in this appeal. Therefore, a brief summary of these proceedings is set out.

As proposed, appellant's railroad line would cross 61 allotments. In 1977, appellant obtained over 600 consents from owners of these allotments. Subsequently, some of the allottees withdrew their consents, stating that they had misunderstood the consent form. In November 1979, appellee rejected appellant's right-of-way application for allotments whose owners had revoked their consents. The Acting Deputy Commissioner of Indian Affairs affirmed appellee's decision on May 30, 1980, holding that the allottees' consent was a prerequisite to the granting of a right-of-way, and that the allottees could revoke their consent at any time prior to the grant. The Acting Deputy Commissioner directed appellee to approve rights-of-way over allotments where the requisite consents had been obtained and other conditions had been met.

An appeal 6/ was taken from this decision by the New Mexico Navajo Ranchers Association, the Pueblo Pintado Chapter of the tribe, and 54 individual Navajos, who contended that, for a number of reasons, all the rights-of-way should have been disapproved as a matter of law. The appeal was referred to Administrative Law Judge L. K. Luoma, who held an evidentiary hearing in December 1980, and issued a recommended decision on June 29, 1981. Judge Luoma agreed with the Acting Deputy Commissioner as to the necessity of the allottees' consent and their right to revoke their consent prior to the grant of a right-of-way. He found that appellant had shown good faith in its efforts to obtain a right-of-way but that there was a question as to whether some or many of the allottees has made knowledgeable consents. He also found there was a lack of appraisal data to support the assessment of fair market value for the right-of-way. He recommended that the right-of-way application be returned to appellee with instructions to "review all consents to determine which ones if any truly reflect the allottees' intent to grant rights-of-way under conditions now prevailing; [r]equire new fair market value appraisals, * * * and [r]equire new consents after appraisals, as appropriate" (Recommended Decision at 9).

On April 6, 1982, the Assistant Secretary returned the right-of-way application to appellee with the instructions recommended by Judge Luoma.

6/ The appeal was originally made to the Board, New Mexico Navajo Ranchers Ass'n v. Commissioner of Indian Affairs, IBIA 80-47-A. By memorandum of Oct. 31, 1980, the Acting Secretary of the Interior assumed jurisdiction over the appeal pursuant to 43 CFR 4.5(a) and transferred it to the Assistant Secretary--Indian Affairs for decision.

On April 16, 1982, appellant filed suit to condemn rights-of-way over allotments whose owners had revoked their consents. Star Lake Railroad Co. v. Fourteen Rights of Way, etc., Civ. No. 82-392-JB (D.N. Mex.). Both appellant and the tribe state that this action was made moot by the decision of the U.S. Court of Appeals for the District of Columbia Circuit in New Mexico Navajo Ranchers Association v. Interstate Commerce Commission, 702 F.2d 227 (D.C. Cir. 1983). This decision concerned a challenge to the Interstate Commerce Commission's (ICC's) grant of authority to appellant and Santa Fe to construct the rail line here concerned. The court remanded the matter to the ICC for further proceedings with respect to the financial viability of the proposed line and for findings as to whether appellant acted in bad faith in soliciting consents from the allottees.

On remand, 7/ the ICC found, inter alia, that the proposed line was financially viable and that appellant "did not reveal a pattern of bad faith or misconduct such as would cast doubt upon the credibility of applicants' undertaking to comply with the environmental conditions imposed in this and previous decisions." Star Lake Railroad Co., Finance Docket Nos. 28272, 29036, 29228, and 29602 (Nov. 13, 1984, Decision at 29).

The ICC reopened the proceeding in December 1985, to consider updated data submitted by the protestants (New Mexico Navajo Ranchers Association et al.) concerning the financial viability of the proposed line. In April

7/ The tribe intervened in the ICC proceeding on remand (Nov. 13, 1984, ICC Decision at 4).

1987, it reaffirmed its earlier decisions. It took official notice of appellee's February 12, 1986, termination of appellant's right-of-way over tribal lands and stated:

> Taking into consideration the termination of the easement and the BIA's analysis, we find that they are not a sufficient reason to modify our earlier finding that the construction and operation of the line is in the public interest. Our authorization is permissive; applicants will have to obtain the easement or make some other acceptable arrangement before they can construct the line.

Star Lake Railroad Co., Finance Docket No. 28272 (Apr. 10, 1987, Decision at 6).

Contentions of the Parties

Appellant argues that appellee should not have terminated its right-of-way for nonuse because it was prevented from using the right-of-way during the 2-year period by circumstances beyond its control. It argues that principles of common law, and provisions of statutory law governing rights-of-way over public lands, 8/ favor the rule that rights-of-way should

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8/ Appellant quotes 30 U.S.C. § 185(o)(3) concerning pipeline rights-of-way, and 43 U.S.C. § 1766, derived from § 506 of the Federal Land Policy and Management Act of 1976. 43 U.S.C. § 1766 provides in relevant part:

"Failure of the holder of the right-of-way to use the right-of-way for the purpose for which it was granted, issued, or renewed, for any continuous five-year period, shall constitute a rebuttable presumption of abandonment of the right-of-way, except that where the failure of the holder to use the right-of-way for the purpose for which it was granted, issued, or renewed for any continuous five-year period is due to circumstances not within the holder's control, the Secretary concerned is not required to commence proceedings to suspend or terminate the right-of-way."

All references to the United States Code are to the 1982 edition.

not be terminated for nonuse when the nonuse is beyond the control of the grantee. Appellant argues that appellee's authority under 25 CFR169.20 is discretionary and that he should have exercised that authority in a manner consistent with Federal policy concerning public lands. In August 1984, pursuant to appellant's request, BLM granted appellant an extension of time in which to file proof of construction on its right-of-way over public lands. Appellant states: "It would clearly be arbitrary and capricious for the Secretary not to apply the same rule to the portion of the right-of-way he has approved over tribal trust lands, since there is no basis in fact or law for a different treatment" (Appellant's Opening Brief at 20).

Appellant also argues that, as a matter of contract law, its inability to perform should be excused as long as the events frustrating performance continue, and that the tribe's past and present opposition to the right-of-way is a defense to the tribe's invocation of the termination provisions of the 1981 agreement between appellant and the tribe.

Appellant further argues that, if its nonuse is not excused as a matter of law, it is entitled to an adjudicatory hearing on certain factual issues: (1) appellant's alleged fault in causing the Navajo objectors' litigation, (2) the role of the tribe in the litigation, and (3) whether termination of the right-of-way is in the tribe's best interest. 9/

9/ Appellant states that the issue of the tribe's best interest is largely irrelevant to the termination issue but, to the extent it is relevant, contends that construction of the railroad is in the tribe's best interest.

Finally, appellant argues that the issue of the 1908 boundary of the Navajo reservation, 10/ which was discussed at pages 4-5 of appellee's February 12, 1986, decision, is not relevant to the matter on appeal and should not be decided by the Board.

Appellee argues that 25 CFR 169.20 provides a basis for the termination of a right-of-way as a matter of discretion but requires termination once the grantee has been given the 30-days' notice specified in the regulation and fails to take corrective action. Appellee states that appellant did not take corrective action, did not apply for an extension of time in which to begin construction, and offered no legal arguments or substantial factual explanation for its failure to use the right-of-way.

Appellee also argues that the right-of-way was terminable under the January 12, 1981, agreement between appellant and the tribe.

Appellee agrees with appellant that an analysis of the best interest of the tribe is not necessary to the resolution of this appeal. He also agrees with appellant that the reservation boundary issue is not relevant and should not be decided by the Board.

Finally, appellee argues that appellant is not entitled to an adjudicatory hearing because the basis for appellee's decision, nonuse of the right-of-way for a 2-year period, does not involve a disputed issue of fact.

10/ This issue concerns the continued existence of the boundary of the Navajo reservation established in various Executive Orders and referred to in section 25 of the Act of May 29, 1908, 35 Stat. 444, 457.

The tribe contends that, because appellant's failure to use the right-of-way is unrebutted, and because the tribe had no part in causing appellant' s failure, appellee correctly terminated the right-of-way as a matter of law. It states that, contrary to appellant's contentions, principles of public land law and contract law are not relevant to Indian lands, which are subject to special statutory provisions. The statutory provision governing forfeiture of railroad rights-of-way, 25 U.S.C. § 315, 11/ does not contain a provision similar to those contained in the public land laws, which allow for excuse of nonuse caused by events beyond the control of the grantee. Neither does the regulatory provision at 25 CFR 169.20. These provisions, under rules of statutory construction developed in the courts, should be construed in favor of the Indians for whose benefit they were enacted. The tribe notes that this principle of construction was incorporated into the January 12, 1981, agreement between appellant and the tribe.

The tribe also argues that various alternative grounds, in addition to the grounds relied on by appellee, compel affirmance of appellee's decision: (1) BIA's grant of the right-of-way was void ab initio for violation

11/ 25 U.S.C. § 315, derived from section 4 of the Act of Mar. 2, 1899, 30 Stat. 990, provides:

"If any such [railroad] company shall fail to construct and put in operation one-tenth of its entire line in one year, or to complete its road within three years after the approval of its map of location by the Secretary of the Interior, the right of way granted shall be deemed forfeited and abandoned ipso facto as to that portion of the road not then constructed and in operation: Provided, That the Secretary may, when he deems proper, extend, for a period not exceeding two years, the time for the completion of any road for which right of way has been granted and a part of which shall have been built."

Appellant contends that the 1899 Act is not applicable to its right-of-way. Given its disposition of this appeal, the Board finds it unnecessary to address this issue.

of 25 U.S.C. §§ 312 and 313, and 25 CFR 169.23(b), (f), and (g), concerning construction of passenger and freight stations, right-of-way width limitations, and other matters; (2) the right-of-way has been forfeited by appellant under the provisions of 25 U.S.C. § 315; (3) the right-of-way was void ab initio because it was granted in violation of the trust duty, and failure to terminate it would be a breach of trust. The tribe contends that approval of the right-of-way violated the trust duty because it was given over the objection of the tribe and because consideration for the grant was insufficient. 12/

The tribe, like appellee, contends that appellant is not entitled to an evidentiary hearing.

Finally, the tribe contends that the rail line would fall primarily within the Navajo reservation, and that the Board is an appropriate forum to address the issue of the 1908 reservation boundary.

Request for Evidentiary Hearing

As discussed below, the Board concludes that this appeal is properly decided on the law and that appellant has shown no reason why an evidentiary hearing is required. It therefore denies appellant's request for a hearing.

12/ The tribe cites an Aug. 21, 1979, letter from appellant to the Secretary of the Interior, which states that it would have cost appellant $11.1 million to route the rail line around the tribal land. The tribe contends that BIA breached its trust duty to maximize return on the trust property by approving the right-of-way for a consideration of $11,672.80, one one-thousandth of the amount it would have cost appellant to avoid the tribal property.

Discussion and Conclusions

Although the parties have raised a number of issues, and appellee's decision also addressed several issues, the Board finds that this appeal must be decided with reference to the applicable statutes and regulations, the January 16, 1981, grant of easement for right-of-way, and the January 12, 1981, agreement between appellant and the tribe, which was incorporated into the grant of easement.

Initially, there is disagreement among the parties as to whether appellee's termination of appellant's right-of-way was mandatory or discretionary. Appellee and the tribe argue that termination was mandatory under the circumstances. Appellant contends that appellee's authority to terminate the right-of-way was discretionary 13/ and allowed appellee to exercise his discretion in a manner consistent with Federal law and policy governing public lands.

The regulation at 25 CFR 169.20, in providing that rights-of-way "may be terminated" under certain circumstances, allows for the exercise of some discretion. 14/ However, that discretion is subject to limitation by Federal

13/ The Acting Deputy Assistant Secretary--Indian Affairs also concluded that the authority to terminate the right-of-way was discretionary and, therefore, that an analysis of the best interest of the tribe was necessary. Under the Board's disposition of this appeal, such an analysis is not required. Therefore, an evidentiary hearing on this issue is not appropriate.

14/ The Board does not address the question of how broad this discretion is, or under what circumstances, if any, BIA could decline to terminate a right-of-way where one of the regulatory grounds for termination was present and termination was requested by the Indian landowner.

statutory and case law and, in this case, also by the provisions of the grant of easement and the agreement incorporated therein. Having approved these documents, appellee was bound by their terms, to the extent they were not in conflict with Federal law or regulation. 15/ Cf. Patencio v. Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 92, 98 (1986).

The fundamental issue in this appeal is simply stated: Was appellee authorized by any provision of Federal statute or regulation, by the grant of easement, or by the agreement between appellant and the tribe, to excuse appellant's nonuse of the right-of-way over the objection of the tribe?

Appellant first argues that the Federal policy governing termination of rights-of-way over public lands, which provides that nonuse of a right-of-way may be excused if it results from circumstances beyond the control of the grantee, should be extended to Navajo tribal lands, regardless of the tribe's wishes.

The Federal policy concerning termination of rights-of-way over public lands is embodied in Federal statutes, which specifically include an excuse provision. 30 U.S.C. § 185(o)(3); 43 U.S.C. § 1766. Federal policy concerning rights-of-way over Indian lands is also embodied in

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fn. 14 (continued)

To the extent that the termination of a right-of-way is based on the exercise of discretion, it is not reviewable by this Board. 43 CFR 4.330(b); Simmons v. Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 243 (1986).

15/ The tribe asserts that the waiver of certain regulatory provisions in the grant of easement was in violation of law. The Board does not address this contention.

Federal statutes, none of which contain a provision analogous to the excuse provision in the public land laws. See 25 U.S.C. §§ 311-328. The failure of Congress to include such a provision in the Indian right-of-way statutes, when it has included one in the public land statutes, is reasonably construed, under rules of statutory construction, as an indication of intent on the part of Congress to deal differently with these two different types of land. See 2A N. Singer, Sutherland Statutory Construction § 53.05 (4th ed. 1984).

[2] In fact, the general body of statutory law governing tribal lands reflects a policy quite different from the policy which guides the management of the public lands. One critical distinction lies in the clear expression in the Indian statutes of a congressional intent to vest Indian tribes with power to control use of their own lands. For instance, 25 U.S.C. § 324 provides: "No grant of a right-of-way over and across any lands belonging to a tribe organized under [the Indian Reorganization Act, 25 U.S.C. 461-479, or the Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501-510] shall be made without the consent of the proper tribal officials." See also, e.g., 25 U.S.C. §§ 396a, 415, 476, 2102, 2203. The judicial and executive branches have also recognized the policy favoring tribal control of tribal lands and resources. E.g., Southern Pacific Transportation Co. v. Watt, 700 F.2d 550 (9th Cir.), cert. denied, 464 U.S. 960 (1983); Wilson v. U.S. Department of the Interior, 799 F.2d 591 (9th Cir. 1986); President's Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98, 100 (Jan. 24, 1983); Conway v. Acting Billings Area Director, 10 IBIA 25, 28, 89 I.D. 382, 384 (1982); Hawley Lake Homeowners' Association v. Deputy Assistant Secretary--Indian

Affairs (Operations), 13 IBIA 276, 288 (1985); Redfield v. Billings Area Director, 13 IBIA 356, 360 (1985).

The regulations concerning rights-of-way over tribal lands further this Federal policy. See Disposal of Rights in Indian Tribal Lands Without Tribal Consent, H.R. Rep. No. 78, 91st Cong., 1st Sess. (1969). 25 CFR 169.3 requires consent of tribal landowners for all rights-of-way, although tribal consent is not required by statute in all cases. 16/ To construe the Federal statutes and regulations governing rights-of-way over tribal land as amenable to the interpretation advanced by appellant would clearly appear to run counter to this policy.

[3] The Indian right-of-way statutes are, moreover, subject to the rule of statutory construction that enactments intended to benefit Indians are to be construed liberally in their favor. E.g., Bryan v. Itasca County, 426 U.S. 373, 392 (1976). This rule of construction applies as well to regulations. Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1332 (10th Cir. 1982). See also Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1569 (10th Cir. 1984), dissenting opinion adopted as majority opinion by the court en banc, 782 F.2d 855 (10th Cir. 1986), cert. denied, 479 U.S.

16/ This provision has been held valid as applied to rights-of-way granted under the Act of Mar. 2, 1899, 30 Stat. 990, 25 U.S.C. §§ 312-318, which does not contain a tribal consent provision. Southern Pacific Transportation Co. v. Watt, supra. See also Transwestern Pipeline Co. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 49, 57-58, 90 I.D. 474, 479 (1983) (concerning the applicability of the consent provision to tribes, like the Navajo Tribe, which are not organized under the Indian Reorganization Act); Northern Natural Gas v. Minneapolis Area Director, 15 IBIA 124, 126-27 (1987).

970, 107 S. Ct. 471 (1986), holding, inter alia, that where the regulations governing tribal oil and gas royalties may reasonably be interpreted in two ways, the Secretary is required by the trust responsibility to interpret them in the way most favorable to the tribe.

Moreover, section 18 of the January 12, 1981, agreement between appellant and the tribe provides:

> Where consistent with its terms, this document is to be construed to the benefit of the Navajo people and Tribal government, with the purpose in mind of fostering understanding of and respect for the land, environment, culture and religion of the Navajo Nation in the greater eastern part of the Navajo Indian Country in these United States. Also, where consistent with its terms, this document is to be construed with the history of Navajo and Indian relationships with railroads and the Federal Government in mind. Such history includes the conditioning of the release of Navajo people from Bosque Redondo on the promise that Navajos would not interfere with railroads then being built; with the taking of vast tracts of unceded Indian lands by the railroads with the condoning or knowing inaction of the Department of the Interior; with the assertion of Navajo Tribal sovereignty and jurisdiction in Eastern Navajo; with the present intentions of our Congressman/trustee who will not consider Navajo (public) needs until private rights are granted to the Railroad Companies; and with the expressed intention of the Secretary of Interior to grant a private right-of-way over the considered objections of the Navajo Nation. [17/]

17/ The tribe's concern that the right-of-way might be granted without its consent was apparently not without foundation. Correspondence between Santa Fe, Departmental officials, and the tribe evidence an attempt on the part of Santa Fe to secure the right-of-way without the tribe's consent, and a willingness on the part of Departmental officials to consider that course of action. Santa Fe's letters to the Secretary, Aug. 21 and Oct. 31, 1979; Solicitor's letters to Santa Fe, Nov. 1, 1979, and tribe, Dec. 5, 1979; Secretary's letter to the tribe, Dec. 14, 1979. See also Solicitor's letters to members of Congress, Nov. 13 and Dec. 5, 1979.

This provision incorporates the rule of construction just discussed. Thus the agreement is, by its own terms, subject to that rule.

Appellant correctly notes that the rule of construction may not be invoked in derogation of the plain language of statutes or regulations. E.g., Andrus v. Glover Construction Co., 446 U.S. 608, 619 (1980). Appellant's proposed construction of the statutes and regulations, however, is not limited to their plain language but, rather, seeks to embellish upon that language to the disadvantage of the Indians.

The Board rejects appellant's argument that the termination provisions of the public land laws should be read into the laws and regulations governing tribal lands and finds, to the contrary, that 25 CFR 169.20 and the January 12, 1981, agreement must be interpreted to the benefit of the tribe and in accord with the Federal policy favoring tribal control over tribal lands.

Appellant next argues that general principles of contract law support its position that its nonuse of the right-of-way must be excused under the January 12, 1981, agreement with the tribe. It thus invokes the Restatement rule concerning frustration of performance:

> Temporary Impracticability or Frustration
>
> Impracticability of performance or frustration of purpose that is only temporary suspends the obligor's duty to perform while the impracticability or frustration exists but does not

> discharge his duty or prevent it from arising unless his performance after the cessation of the impracticability or frustration would be materially more burdensome than had there been no impracticability or frustration.

Restatement (Second) of Contracts § 269 (1981). It also argues that the tribe acted in derogation of its implied contractual duty not to hinder appellant's efforts to obtain authorization to build the rail line.

The tribe counters, inter alia, with the obligation of a contractor, under ordinary circumstances, to secure a necessary Government license:

> Ordinarily, when one contracts to render a performance for which a government license or permit is required, it is his duty to get the license or permit so that he can perform. The risk of inability to obtain it is on him; and its refusal by the government is no defense in a suit for breach of his contract. [18/]

6 A. Corbin, Corbin on Contracts § 1347 (1962).

These principles of contract law, while perhaps of some relevance to the January 12 agreement, cannot control interpretation of the Federal regulation involved here. Moreover, the agreement itself must be interpreted primarily by reference to its own provisions, including the rule of construction incorporated in the agreement and discussed above.

Section 19 of the agreement provides: "This Agreement shall be effective on the date hereof and shall terminate in accordance with the provisions

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18/ Appellant disputes the relevance of this rule, arguing that the tribe prevented it from obtaining the license. See discussion infra.

of 25 C.F.R. [Part 169] and the Interstate Commerce Act." Neither this section nor any other provision of the agreement indicates an intent to limit or expand upon the regulatory provisions for termination of rights-of-way. Specifically, the agreement does not contain a force majeure provision, in contrast to many leases of Indian trust lards. See, e.g., Sunny Cove Development Corp. v. Cruz, 3 IBIA 33, 40, 81 I.D. 465, 469 (1974); Racquet Drive Estates Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 184, 196, 90 I.D. 243, 249 (1983); Franks v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 231, 236 (1985). Therefore, the Board finds that the parties to the January 12, 1981, agreement did not intend therein to vest any party with additional rights or obligations regarding termination beyond those provided in the regulations.

The provisions for termination in the grant of easement, quoted above, are also substantially identical to the regulatory provisions. In Administrative Appeal of Brown County, Wisconsin, 2 IBIA 320 (1974), the Board upheld the termination of a right-of-way for nonuse for a 2-year period. Noting that the regulatory provisions for termination had been incorporated into the right-of-way grant, the Board stated: "The * * * limitations contained in the regulations are clearly and expressly set forth in the grant and consequently not subject to interpretation because of ambiguity. The appellant accepted the Grant and by so doing becomes bound by all its restrictions, reservations, and exceptions." 2 IBIA at 323. In Whatcom County Park Board v. Portland Area Director, 6 IBIA 196, 84 I.D. 938 (1977), upholding termination of a right-of-way over tidelands belonging to the Lummi Tribe, the Board similarly found that the parties were bound by the terms of

the right-of-way grant, including a tribal resolution incorporated therein. The Board found that termination was proper because the grantee had breached conditions of the grant. 19/

[4] 25 CFR 169.20 does not expressly provide for excuse of nonuse of the right-of-way for any reason. No provision of statute or regulation expressly authorizes excuse under the circumstances present here. 20/ In providing that a right-of-way "may be terminated," the regulation allows for the exercise of some discretion. For instance, it would undoubtedly allow for excuse of involuntary nonuse with the Indian landowner's consent. However, as previously discussed, congressional policy expressed in statutes governing rights-of-way over tribal land and the management of tribal lands generally, and the judicially developed rule of construction applicable to these enactments, clearly disfavor dispositions of tribal land without the consent of the tribe. The Board finds that appellee correctly concluded termination was mandated by the regulation and the right-of-way documents, because no provision of statute, regulation, or the right-of-way documents authorized him to excuse the nonuse without the consent of the tribe.

19/ The Lummi Tribe had initially favored the right-of-way, but ultimately changed its mind and requested termination. The Board noted:

"While there is ample support for appellant's claim that the Lummi Indian Tribe unilaterally decided in 1972 that it did not want to go ahead with plans for a park on Portage Island, the record is convincing that this change of attitude occurred only after the appellant breached important conditions of the right-of-way grant."

6 IBIA at 224, 84 I.D. at 951. Similarly, the record here indicates that the tribe sought termination only after the 2-year period had expired. See discussion infra.

20/ 25 U.S.C. § 315, quoted at note 11, supra, authorizes excuse under certain circumstances not present here. The Board's disposition of this appeal would be the same whether or not the Act of Mar. 2, 1899, 30 Stat. 990, from which section 315 is derived, applies to the right-of-way at issue here.

Finally, appellant argues that, if its nonuse of the right-of-way is not excused as a matter of law, it is entitled to an evidentiary hearing. It also argues that it is entitled to have the 2-year period in which it was required to begin use of the right-of-way tolled under authority of the decision of the U.S. Court of Appeals for the Tenth Circuit in Jicarilla Apache Tribe v. Andrus, supra. In that case, the Jicarilla Apache Tribe brought suit to cancel certain of its oil and gas leases. The district court tolled the 10-year primary terms of the leases from the date the lessees were served with process in the lawsuit, and the court of appeals affirmed. In tolling the term of the leases, the court invoked an equitable doctrine against the plaintiff tribe, which, by initiating the lawsuit, had impeded the lessees' ability to perform under the leases. 687 F.2d at 1340-41.

Appellant suggests that, like the Jicarilla Apache Tribe, the tribe here impeded appellant's ability to begin use of the right-of-way. This interference, appellant alleges, was the tribe's covert encouragement of, and perhaps assistance in, the ICC protest and related proceedings initiated by individual Navajos, the New Mexico Navajo Ranchers Association, and the Pueblo Pintado Chapter. In support of this allegation of tribal involvement, appellant cites only the fact that the tribe's present counsel also represented individual Navajos in the earlier suit. Appellant argues that it is entitled to an evidentiary hearing to elicit evidence of the tribe's covert actions. Presumably, appellant believes a hearing would show that this case falls squarely under the holding in Jicarilla Apache.

The tribe and its counsel emphatically deny appellant's allegations. They state that the first action by the tribe against appellant was the

tribe's motion to intervene in the ICC proceeding, which it filed in June 1983, more than 2 years after the initial grant of the right-of-way.

This argument places appellant's speculations against the tribe's counsel's denial of earlier involvement by the tribe. The question before the Board is whether appellant has shown that the Board should exercise its discretion to order an evidentiary hearing on this issue. 43 CFR 4.337(a).

As an attorney and officer of the court, counsel for the tribe is bound by the rules adopted by the legal profession to govern itself. Rule 3.3 of the Model Rules of Professional Conduct, adopted by the American Bar Association on August 2, 1983, provides:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal;
>
> * * * * * *
>
> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

The comment on this rule states:

> An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. * * * However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the

> lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. [Emphasis added.]

Tribal counsel is, accordingly, potentially subject to disciplinary proceedings, both by his state bar association and by the Department of the Interior (see 43 CFR 1.6), if he knowingly made a false statement concerning the tribe's involvement in the earlier proceedings in this case. On the record here, the Board is unwilling to assume that he may have done so.

Under these circumstances, the Board does not find appellant's speculations persuasive of the necessity for an evidentiary hearing on this issue. There is nothing in the record to indicate the tribe took any action to impede appellant's use of the right-of-way during the first 2 years of its existence. The tribe and its counsel deny any such action. Other than the identity of counsel, appellant offers nothing to suggest that its assertion of tribal involvement has merit. See General Motors Corp. v. Federal Energy Regulatory Commission, 656 F.2d 791, 798 n.20 (D.C. Cir. 1981) ("[W]here a party requesting an evidentiary hearing merely offers allegations or speculations without an adequate proffer to support them, the Commission may properly disregard them"). Therefore, the Board finds no grounds for ordering an evidentiary hearing or invoking the equitable tolling doctrine of Jicarilla Apache against the tribe.

While the Board is not prepared to hold that there are no circumstances in which involuntary nonuse of a right-of-way may be excused without the consent of the tribe, it concludes that, under the circumstances of this

case, termination was mandated by the regulation and the right-of-way documents, because no provision of statute, regulation, or the right-of-way documents authorized him to excuse the nonuse without the consent of the tribe.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the February 12, 1986, decision of the Navajo Area Director is affirmed. 21/

_____
Anita Vogt
Acting Chief Administrative Judge

I concur:

_____
Kathryn A. Lynn
Administrative Judge

21/ Other issues raised by the parties are found not to be relevant and are not addressed.